

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

June 4, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-3555-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES R. BROWNSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Judgment affirmed; order reversed and cause remanded.*

NETTESHEIM, J.            James R. Brownson appeals from a judgment of conviction and an order denying postconviction relief without a

hearing.<sup>1</sup> On appeal, Brownson contends that the trial court erred by refusing to reinstate his probation and by rejecting his motion to withdraw his no contest pleas. We hold that the trial court correctly rejected Brownson's request for reinstatement of the probation. However, we conditionally reverse the trial court's rejection of Brownson's plea withdrawal request without a hearing under *State v. Rivest*, 106 Wis.2d 406, 316 N.W.2d 395 (1982). That hearing will allow the trial court to determine whether a condition of probation imposed by the Department of Corrections was in conflict with a condition of probation imposed by the trial court. See *id.* at 411-14, 316 N.W.2d at 398-99.

### FACTS

On August 20, 1993, Brownson pled no contest to three counts of violating WIS. ADM. CODE § ATCP 110.05(2)(d), governing home improvement contracts. Brownson's plea was pursuant to a plea agreement which included a provision that Brownson would not engage in noncommercial construction in the future. The trial court accepted Brownson's plea, withheld sentence and placed Brownson on probation for three years under the supervision of the Department. The conditions of probation required, inter alia, that Brownson not engage in any noncommercial home improvement construction covered by WIS. ADM. CODE § ATCP 110.01.

On September 14, 1993, Dennis Schuchardt, Brownson's supervising probation agent, sent a letter to the trial court asking that the condition of probation be clarified. Schuchardt explained that he and Brownson differed as

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<sup>1</sup> Although Brownson appeals from both the judgment of conviction and the postconviction order, his appellate issues are directed only at the trial court's postconviction ruling. We therefore affirm the judgment without further comment.

to what was considered “noncommercial construction.” In response, the court directed Schuchardt to contact the district attorney and Brownson’s counsel about the matter. The district attorney responded, stating that the condition of probation applied to any violation of chapter 110 of the Administrative Code, ATCP. The record does not reveal any reply from Brownson’s counsel.

Schuchardt then required Brownson to divulge certain information pertaining to Brownson’s employment activities for Green Valley Excavators, Ltd., a construction company which employed Brownson. Because Brownson did not comply with these directives, Schuchardt commenced revocation of probation proceedings against Brownson in early 1994. However, the hearing examiner concluded that the Department had not proven the violations because the corporation refused to divulge the requested information. The examiner did state, however, that Brownson “was and is deeply involved in all aspects of the operations of the corporation ....” The examiner also observed that the efforts to supervise and enforce the trial court’s condition of probation were inadequate “for the most part because the agent is not a lawyer, and thus does not have knowledge of the laws governing corporations.” The Department appealed this decision, but the Division of Hearings and Appeals upheld the examiner’s findings and conclusions.

Following this ruling, Schuchardt notified Brownson in writing on June 20, 1994, as follows:

Because of the finding of the Division of Hearings and Appeals, I cannot effectively supervise you while employed, or contracted, by Green Valley Excavators. You are therefore directed to cease all business relationships, of any kind, including but not limited to, employee, advisor or sub-contractor with Green Valley Excavators Ltd. by 7/7/94 your next scheduled appointment with me.

Brownson administratively appealed Schuchardt's directive.<sup>2</sup> While the appeal was pending, a probation hold was placed against Brownson and further revocation proceedings were commenced.

At this point, this case takes on an intriguing and odd twist. Despite his pending administrative challenge to Schuchardt's directive, Brownson chose to not contest the revocation. Thus, he stipulated to the revocation of probation, and on September 24, 1994, he was returned to the trial court for sentencing. The court imposed consecutive six-month jail terms.

Brownson then brought a postconviction motion seeking reinstatement of his probation or withdrawal of his pleas. In support, Brownson argued that Schuchardt's directive that he cease employment with Green Valley Excavators was contrary to the trial court's condition of probation which required that Brownson cease only noncommercial construction.<sup>3</sup> Without a hearing, the trial court rejected these arguments in a written decision. Brownson appeals.

## DISCUSSION

We first address Brownson's argument that the trial court should have reinstated his probation. Since there are no statutory provisions for judicial review of an administrative decision to revoke probation, Brownson was obligated to seek judicial review by way of certiorari. *See State ex rel. Johnson v. Cady*, 50 Wis.2d 540, 550, 185 N.W.2d 306, 311 (1971). Brownson, however, failed to pursue this required avenue of relief. Instead, he tried to convert this sentencing

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<sup>2</sup> The parties' briefs do not advise us as to the authority for such a procedure. We assume it is WIS. ADM. CODE § DOC 328.11.

<sup>3</sup> Brownson raised other arguments in support of his motion. We limit our recital to only those which are renewed on this appeal.

proceeding into a certiorari review proceeding. The trial court properly rejected that effort.

Next, we address Brownson's argument that the trial court should have allowed him to withdraw his no contest pleas. Brownson argues that Schuchardt's directive that he cease all affiliation with Green Valley Excavators was an invalid modification or extension of the trial court's condition of probation. Thus, he contends that he did not receive the benefit of his plea agreement which included the ban on noncommercial home improvement activity. *See State v. Washington*, 176 Wis.2d 205, 214 n.2, 500 N.W.2d 331, 335 (Ct. App. 1993). He contends that he was entitled to a hearing on this question under *Rivest*. As we have noted, the trial court denied Brownson's motion without a hearing.

The Department is not only entitled, but is required, to establish written rules of supervision that are supplemental to existing court-imposed conditions. *See WIS. ADM. CODE § DOC 328.04(2)(d)*. However, Brownson contended that Schuchardt's directive was in contradiction of the trial court's condition of probation. It is for the sentencing court to arbitrate whether a department-imposed condition of probation is consistent or inconsistent with a court-imposed condition. *See State ex rel. Taylor v. Linse*, 161 Wis.2d 719, 724, 469 N.W.2d 201, 203 (Ct. App. 1991).

Here, the trial court ruled that Schuchardt's directive was not inconsistent with the court's condition of probation. However, the court made this ruling without conducting the hearing mandated by *Rivest*. The court's holding appears to assume that Brownson's activities as a Green Valley Excavators employee violated the court's condition of probation. But without a hearing on the question, we fail to see how the court could make this determination. Brownson's

motion contended otherwise, arguing that Schuchardt's directive intruded on his ability to engage in commercial construction—an activity which the trial court's condition of probation did not prohibit. In response to Brownson's motion, the State moved to dismiss on the grounds that Brownson's motion was not timely.<sup>4</sup> However, the State's motion never directly contested the substance of Brownson's complaint.

Under these facts, a *Rivest* hearing was necessary to determine whether Brownson's argument could be factually sustained. *Rivest* holds that such a hearing is a necessary component of due process. See *Rivest*, 106 Wis.2d at 413, 316 N.W.2d at 399. On this basis, we are compelled to conditionally reverse the trial court's postconviction ruling. We remand for a *Rivest* hearing.

We stress that our remand in no way suggests the result of that hearing. If, based on the evidence at the hearing, the trial court concludes that Schuchardt's directive was not in contravention of the court's condition of probation, the court should deny Brownson's request to withdraw his pleas and reenter the judgment of conviction. If the court concludes that Schuchardt's directive contravened the court's condition of probation, the court should then determine whether that constitutes a manifest injustice such that Brownson should be permitted to withdraw his pleas. See *State v. Booth*, 142 Wis.2d 232, 235, 418 N.W.2d 20, 24 (Ct. App. 1987). In addition, since a defendant may not delay the motion until he or she has tested the weight of potential punishment, see *id.* at 237,

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<sup>4</sup> The State's timeliness argument was based on the fact that Brownson had filed a prior postconviction motion following the original judgment in this case which placed him on probation. However, Brownson's present postconviction motion followed the further judgment which imposed the jail sentences following the revocation of probation. Moreover, the basis of the present postconviction motion was Schuchardt's directive. That directive had not yet been issued at the time of the prior postconviction motion.

418 N.W.2d at 22, the court may also choose to address whether Brownson's application for plea withdrawal was timely under this standard.

*By the Court.*—Judgment affirmed; order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

